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In the Supreme Court of the United States

PAUL D. LAPIDES,
Petitioner,
v.
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, COLORADO, DELAWARE, FLORIDA, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

When a State is sued in state court and removes the case to federal court, does the State expressly and unequivocally waive its Eleventh Amendment immunity by virtue of the defensive, procedural act of removal?

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INTEREST OF *AMICI*

State *Amici* appear in support of Respondent, *see* SUP. CT. R. 37.4, urging the Court to affirm the judgment of the Eleventh Circuit and hold that a State sued in state court on both state and federal claims does not waive its Eleventh Amendment immunity when an assistant attorney general removes the case to federal court. State *Amici* have an interest in this case because it directly implicates their constitutional immunity from suit, which inheres in the States' sovereign status and is exemplified by the Eleventh Amendment rights at stake in this appeal.

SUMMARY OF ARGUMENT

An assistant attorney general's removal of a case to federal court does not signal a State's consent to suit. Removal, pursuant to 28 U.S.C. §1441, is a procedural option available to any defendant sued in state court on federal claims. A state defendant is not transformed into a plaintiff once the suit arrives in federal court. Rather, the suit remains one "commenced or prosecuted against one of the United States," which falls squarely within the prohibition of the Eleventh Amendment. U.S. CONST. amend. XI.

To infer a waiver of Eleventh Amendment immunity from removal would strip state legislatures of their power to determine the circumstances under which States may be sued. The legislative branch is uniquely equipped to evaluate the fiscal, policy-driven, and practical compromises that inform a State's consent to suit. The federal judiciary should not divest state legislatures of the right to engage in this deliberative, political process by imbuing relatively politically unaccountable, assistant attorneys general with a power to consent to suit not conferred by state law. *See Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459 (1945).

Nor should the Court embrace the notion that the Eleventh Amendment affords a mere "forum immunity" readily severable from the States' constitutional immunity from suit. The States' inviolable sovereignty is not comprised of defeasible components subject to erosion on a case-by-case basis. Moreover, so-called "forum immunity" was a matter of grave importance to the Framers and the people whose legislatures ratified the Eleventh Amendment, and it should not lightly be cast aside.

Moreover, a waiver-by-removal rule would impose practical costs beyond the States' Eleventh Amendment immunity—particularly when a State, like Georgia in this case, is sued along with individual codefendants. These individuals may desire federal adjudication of their qualified-immunity defense—the

denial of which can be appealed as a matter of right in federal court, but not always in state courts. States would be compelled to thwart their employees' removal, however, to avoid sacrificing their own Eleventh Amendment immunity. And that is a Hobson's Choice States should not have to make, and a penalty sued state employees should not have to suffer.

A waiver-by-removal rule is an affront to the States' sovereign status that cannot be squared with federalism principles and longstanding Eleventh Amendment jurisprudence. The Eleventh Circuit correctly refused to equate removal with consent to suit, and its judgment should be affirmed.

ARGUMENT

I. THE COURT SHOULD NOT INVADE THE STATES' INVIOLABLE SOVEREIGNTY BY IMPLYING A WAIVER OF ELEVENTH AMENDMENT IMMUNITY WHEN A STATE DEFENDANT REMOVES A CASE TO FEDERAL COURT.

The States are sovereigns in their own right, imbued with a constitutional immunity that prohibits suits by individuals absent the States' express and unequivocal consent. *See, e.g., Alden v. Maine*, 527 U.S. 706, 712-13 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681-82 (1999). The States' immunity is "one of the attributes" that is "inherent in the nature of sovereignty," reflecting "the general sense and the general practice of mankind." THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also Alden*, 527 U.S., at 714 ("The federal system established by our Constitution preserves the sovereign status of the States . . . . together with the dignity and essential attributes inhering in that status.").

Just as an unconsenting State cannot be sued in its own courts, nor can it be sued in federal court. U.S. CONST. amend. XI; *Alden*,

527 U.S., at 730-31. In both scenarios, immunity flows from the same source: a State's sovereign status. 527 U.S., at 728-31.

Notwithstanding the States' "inviolable sovereignty," *id.*, at 714 (quoting THE FEDERALIST NO. 39, at 245 (James Madison)), Lapides claims that his suit against Georgia can proceed in federal court over Georgia's objection.[1] Lapides does not purport to rely on any congressional waiver of sovereign immunity pursuant to §5 of the Fourteenth Amendment—an enforcement provision this Court recognizes as a permissible vehicle for abrogating the States' sovereign immunity. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (discussing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)). Nor does Lapides identify any Georgia statute that expressly and unequivocally consents to a suit, like his, in federal court. *See Alden*, 527 U.S., at 755 (noting States' ability to consent by statute). Instead, Lapides argues that his suit may proceed because an assistant attorney general removed it to federal court pursuant to 28 U.S.C. §1441. This theory of waiver cannot be squared with the plain text of the Eleventh Amendment or this Court's sovereign-immunity jurisprudence.

A. Under the Plain Text of the Eleventh Amendment, a Removed Suit Against a State Cannot Proceed in Federal Court.

Pursuant to the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State." U.S. CONST. amend. XI. Although the amendment speaks solely in terms of suits in law or equity brought

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1. The Georgia defendants moved to dismiss Lapides's suit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting, *inter alia*, Eleventh Amendment immunity from suit. *See* J.A. 48-50.

by citizens of other or foreign States, the Court has not limited the Eleventh Amendment's jurisdictional strictures to its text. *See Alden*, 527 U.S., at 727.

Instead, the amendment has been construed as exemplifying a larger constitutional immunity enjoyed by the sovereign States. *Id.*, at 728; *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997). Thus, nonconsenting States are immune from federal suits brought by a State's own citizens, *Hans v. Louisiana*, 134 U.S. 1 (1890), as well from admiralty suits, which are not suits "in law or equity" included within the amendment's literal terms. *Ex parte New York*, 256 U.S. 490 (1921).

The critical aspect of the Eleventh Amendment, therefore, is its broad prohibition of any suit "commenced or prosecuted" by an individual against one of the States. U.S. CONST. amend. XI; *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Alden*, 527 U.S., at 727-29. Since a removed suit against a State falls into this category, it is a suit barred by the Eleventh Amendment.

A State defendant's removal does not alter the fundamental nature of the suit or realign the parties. If the suit demands judgment on claims asserted against a State, it is a suit "commenced or prosecuted against one of the United States" within the meaning of the Eleventh Amendment. *See Missouri v. Fiske*, 290 U.S. 18, 26 (1933) ("To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit, is, according to the common acceptance of language, to continue that demand.").

Although a removed suit is not "commenced" in federal court, it nonetheless remains a suit "prosecuted against one of the United States," U.S. CONST. amend. XI, due to the plaintiff's continued demand for judgment. *Fiske*, 290 U.S., at 26-27. Either action is enough to offend the Constitution and the States' sovereignty. U.S.

CONST. amend. XI (conferring immunity from federal-court suits "commenced *or* prosecuted against one of the States") (emphasis added). As such, the plain terms of the Eleventh Amendment apply—irrespective of removal—and an individual suit cannot proceed against an unconsenting State in federal court. *See id.*

B. The Removal Statute Applies to Any Defendant Sued in State Court on Federal Claims, and a State Defendant's Availment of This Procedure Cannot Be Equated with Express and Unequivocal Consent to Suit.

1. The States cannot be sued without their express and unequivocal consent.

To waive sovereign immunity, including Eleventh Amendment immunity, a State must expressly and unequivocally consent to suit. *See, e.g., College Sav.*, 527 U.S., at 681-82; *Pennhurst State Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). This is because the States' immunity is of constitutional dimension, and "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-40 & n.1 (1985) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). For purposes of the Eleventh Amendment, "[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.*, at 241.

Typically, the Court deems a State to have consented to suit in federal court when a state statute expressly and unequivocally reflects that consent. *Id.*, at 238 n.1; *see also Alden*, 527 U.S., at 755. Consent to suit in state court will not suffice, because "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S., at 99-100 & n.9.

States also are deemed to consent to suits "pursuant to the plan of the Convention or subsequent constitutional Amendments"—such as a suit brought against a State by the United States. *Alden*, 527 U.S., at 755; *Coeur d'Alene*, 521 U.S., at 267. Similarly, the States, in adopting the Fourteenth Amendment, consented to suits authorized by Congress through appropriate legislation under its §5 enforcement powers. *Alden*, 527 U.S., at 756.

Under no circumstances, however, may a waiver of sovereign immunity be constructively implied through a State's litigation or other conduct. *See College Sav.*, 527 U.S., at 681-82; *Atascadero*, 473 U.S., at 238-40 & n.1; *cf. infra* Part I.B.3. Because an unequivocal and express waiver of immunity is required to waive a State's sovereign immunity, waiver cannot be inferred from a State's mere exercise of the statutory right of removal available to any defendant. *See infra* Parts I.B.2, .B.3.

2. The removal statute does not, and could not, waive the States' Eleventh Amendment immunity.

Removal is a statutorily created, procedural benefit available to any defendant sued in state court on federal claims:

> "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. §1441.

Nothing in the removal statute indicates that exercising this procedural option comes at a price if the defendant happens to be a State. *See id.*; *see also* U.S. Br., at 19. Certainly, there is no expression of congressional intent to waive State defendants' Eleventh Amendment immunity upon removal. *See Garrett*, 531 U.S., at 363 (noting the requirement that Congress expressly indicate its unequivocal intent to waive the States' immunity under the Eleventh Amendment).

Nor, as discussed in Respondent Georgia's brief, does anything in the legislative history of §1441 suggest congressional intent to withhold the option of removal from sued States or condition its availability on forfeiture of States' Eleventh Amendment immunity. *See* Resp't Merits Br. Part A.4. Rather, the removal statute was enacted to provide all defendants the benefit of federal expertise on federal questions of law. *See id.*

As a general procedural statute, moreover, 28 U.S.C. §1441 could not waive sovereign immunity because such an act would not fall within Congress's constitutional authority. Congress's only valid basis for abrogating the States' immunity is its enforcement power under §5 of the Fourteenth Amendment. *See, e.g., Garrett*, 531 U.S., at 364. This grants Congress authority to enforce the substantive guarantees of §1 of the Fourteenth Amendment, including due process and equal protection. *Id.*, at 365. But, under §5, Congress is limited to enacting legislation that exhibits "congruence and proportionality" between the constitutional injury to be prevented and the means employed. *Id.* When Congress exercises §5 powers, therefore, there must be a constitutional right at stake *and* Congress must identify a history and pattern of the States violating that constitutional right. *Id.*, at 365, 368.

No constitutional right—much less a pattern of unconstitutional State activity—is implicated by Congress's enactment of 28 U.S.C. §1441. That statute merely provides any defendant in "any civil action brought in a State court of which the district courts of the United States have original jurisdiction" the opportunity to remove a case to federal court. 28 U.S.C. §1441. By no means can §1441 be characterized as remedial legislation in response to a pattern of constitutional abuses on the part of the States. It is simply a procedural vehicle authorizing removal of state-court suits that include federal claims. *See* Resp't Merits Br. Part A.4. As such, §1441 could never meet the stringent criteria for a congressional waiver of Eleventh Amendment immunity. *See Garrett*, 531 U.S.,

at 363-65 (reaffirming that Congress can only waive the States' immunity "when it both unequivocally intends to do so and 'acts pursuant to a valid grant of constitutional authority'"—*i.e.*, "only to the extent the statute is appropriate §5 legislation") (quoting, in part, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000)).

The Court should not judicially imply a waiver into §1441 to achieve a result Congress itself could not statutorily effect. *See Alden*, 527 U.S., at 751 ("It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.") (quoting *Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711, 727-28 (1883)); *Am. Fed'n of State, County & Mun. Employees*, 949 F.Supp. 438, 442 (W.D. Va. 1996) (rejecting plaintiff's argument for an implied waiver of Eleventh Amendment immunity because "it would be doing indirectly that which Congress could not do directly"), *aff'd sub nom. Abril v. Virginia*, 145 F.3d 182 (CA4 1998); *cf.* Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 524 (2001) ("Certainly, it has never been thought that the judiciary can consent for the sovereign in the particular case.").

Moreover, it would be antithetical to the "attributes of sovereignty," FEDERALIST NO. 81, at 487, and this Court's longstanding Eleventh Amendment jurisprudence, to afford States *fewer* procedural rights under §1441 than other defendants. It is elemental that the States' defensive rights exceed those of ordinary litigants due to the States' sovereign status. *See, e.g., Hans*, 124 U.S., at 12-16. Because sovereignty erects additional barriers to suits against the State, it is implausible that a State defendant should be deprived of procedural advantages available to any other defendant sued in state court on federal claims. *See* 28 U.S.C. §1441.

3. A State's defensive litigation conduct, such as removal, does not equate with express and unequivocal consent to suit.

Apart from the types of consent previously discussed, *see supra* Part I.B.1, the Court has held that a State that brings its own claim to federal court consents to federal court jurisdiction. Thus, "[i]f the state chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the state may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest." *Fiske*, 290 U.S., at 28; *see also, e.g., Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) (holding that New Jersey waived Eleventh Amendment immunity by filing a proof of claim in federal bankruptcy court); *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883) (holding that Rhode Island's voluntary intervention to prosecute a claim to a controverted fund constituted consent to suit).

The mere act of removal, however, is not comparable to initiation of a federal suit for the purpose of enforcing a state entitlement or prosecuting a state claim. *Cf. Gardner*, 329 U.S., at 574; *Clark*, 108 U.S., at 447-48. Rather, removal is a defensive procedural act. *See supra* Part I.B.2.

Indeed, this Court expressly contemplated, in *Wisconsin Department of Corrections v. Schacht*, that a state defendant could assert Eleventh Amendment immunity following removal of a case to federal court. 524 U.S. 381, 392 (1998) ("A State's proper assertion of an Eleventh Amendment bar *after* removal means that the federal court cannot hear the barred claim.") (emphasis added). The issue in *Schacht* was the effect of Eleventh-Amendment-barred claims on removal jurisdiction, not waiver of a State's Eleventh Amendment immunity. *Id.*, at 386. But, in deciding that question, the Court distinguished the mere presence of constitutionally barred claims—which do not defeat removal jurisdiction—from "[t]he State's *later invocation* of the Eleventh Amendment," which

"place[s] the particular claim beyond the power of the federal courts to decide." *Id.*, at 391 (emphasis added). Thus, *Schacht* indicates that the Eleventh Amendment presents a jurisdictional hurdle even in suits removed by a state defendant to federal court. *See id.*

Lapides and the United States distort the "voluntary" nature of a state defendant's removal of a case—automatically equating this *defensive* act with consent to suit in federal court. This Court, however, has never held that *every* "voluntary" entry into federal court waives a State's Eleventh Amendment immunity.

For example, in *Missouri v. Fiske*, the State voluntarily intervened in a federal action to prevent distribution of stocks subject to pending inheritance-tax proceedings before a state probate court. 290 U.S., at 19. Parties in the federal action then filed an "ancillary and supplemental bill of complaint" to enjoin Missouri from interfering with the stock. *Id.*, at 24. The Court held that this ancillary pleading was a suit against the State barred by the Eleventh Amendment, and that the State did not consent to federal jurisdiction through its voluntary intervention in the case. *Id.*, at 25-27. The State intervened solely for the limited purpose of protecting its interest in inheritance taxes to be determined by the state probate court, and not for the purpose of litigating the rights at stake in the federal suit. *Id.*, at 19, 27. And since Missouri could not be sued in federal court on an original bill without its consent, neither could it be sued on an ancillary bill filed after its intervention. *Id.*, at 28.

Just as Missouri's limited, voluntary intervention in a federal suit could not create a basis for federal jurisdiction that did not originally exist, *see id.*, nor can a State's mere removal of a case to federal court erase the jurisdictional strictures of the Eleventh Amendment. By removing a case, the State does not "come into the court as plaintiff" or "intervene, seeking the enforcement of liens or claims." *Id.*, at 28. The State simply defends a lawsuit, exercising the procedural option of removal available to *any*

defendant sued in state court on federal claims. This purely defensive act in no manner signals consent to be sued in federal court. *See Frances v. Wright*, 19 F.3d 337, 343 (CA7 1994) ("[T]he mere fact that Defendants removed the case to federal court" is not "the kind of explicit waiver of federal sovereign immunity required by the [Supreme] Court"), *abrogated on other grounds by Schacht*, 524 U.S., at 385-86. Rather, removal can reflect a variety of other practical and policy-driven concerns, as detailed *infra* Part III.

The Court should not infer a State's consent to suit in federal court based solely on *defensive* litigation conduct. Lapides and the United States urge the Court to equate removal with affirmative consent to federal-court jurisdiction, but they do not contend that removal literally transforms a sued State from a defendant into a plaintiff or an intervenor seeking enforcement of liens or claims. And these are the predominant circumstances in which the Court has construed a State's litigation conduct as consent to suit. *See, e.g., Gardner*, 329 U.S., at 574; *Clark*, 108 U.S., at 448.[2]

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2. Two "defensive" waiver cases discussed most extensively by Lapides' *amici* are distinguishable on their facts. In *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273 (1906), the Court held that South Carolina was not immune from an ancillary suit filed under the same cause number as a previous suit to enjoin tax collection, in which the attorney general never asserted Eleventh Amendment immunity, defended on the merits, and appealed to this Court, which affirmed judgment for the plaintiffs. The *Gunter* holding, however, was premised on more than defensive conduct: an express statutory mandate required the attorney general to represent the State in such tax suits, *id.*, at 286-88; the doctrine of *res judicata* bound the State to the original judgment, *id.*, at 290-91; and the State voluntarily obeyed the original judgment for twenty-five years before pursuing the collections at issue in *Gunter*. *Id.*, at 289. Thus, under the confluence of these factors, South Carolina consented to suit. *Id.*, at 292; *see also Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 56-57 (1944) (describing *Gunter*'s tri-part reasoning).

The concept of waiver-by-removal advanced by Lapides and the United States does not rest on a State's express and unequivocal consent to federal-court jurisdiction, as is required to waive Eleventh Amendment immunity. *See supra* Part I.B.1. The Court's

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Similarly, the Court's waiver holding in *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44 (1916), implicated more than a single defensive act comparable to removal. In that case, a Puerto Rico statute authorized a party protesting taxes to sue the treasurer "in the court having competent jurisdiction thereto." *Id.*, at 47 (quoting No. 35, Laws of Porto Rico, 1911 § 3). Eight months after the initiation of such a suit, with trial set and multiple answers on file, the attorney general moved to dismiss on Eleventh Amendment grounds. The Court held that "having solemnly appeared and taken the other steps above narrated," Puerto Rico could not now contest jurisdiction. *Id.*

Although the Court recognized the defendant, Puerto Rico, as a sovereign required to consent to suit, *id.*, the opinion contains no mention of the Eleventh Amendment. *Cf. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 141 n.1 (1993) (noting the First Circuit's holding that Puerto Rico is "treated as a State for purposes of the Eleventh Amendment" but expressing "no view on this matter"). Thus, it is unclear whether, in 1916, the Court contemplated that *Richardson*'s waiver analysis would apply equally to the States, given their express constitutional immunity from federal-court suits. Moreover, *Richardson* analyzed litigation conduct far more extensive than removal—although State *Amici* submit that even Puerto Rico's attorney general's actions did not "consent" to suit. In that respect, State *Amici* agree with the United States, *see* U.S. Br., at 25-26, that it is difficult to reconcile *Richardson* with *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945) (holding that an attorney general unauthorized by state law to waive immunity cannot consent to suit; thus, the State can invoke the Eleventh Amendment for the first time on appeal to this Court). To the extent *Richardson* inferred waiver from an attorney general's defensive conduct, the Court should reaffirm that *Ford Motor Co.*, not *Richardson*, correctly states the law. *See infra* Part I.D.

Eleventh Amendment jurisprudence dispels any notion that a State can implicitly waive sovereign immunity through defensive litigation conduct.

Because a waiver-by-removal rule does not comport with traditional sovereign-immunity analysis, Lapides and the United States may be best understood as advocating a unique procedural penalty for sovereign States who exercise the option of removal available to any other defendant as a matter of right. The problem is, no constitutional basis for such a penalty exists. *See supra* Part I.B.2. Fundamental notions of federalism, and fair play, preclude conditioning State defendants' removal on forfeiture of their Eleventh Amendment immunity.

4. The United States's inability to waive sovereign immunity through litigation conduct militates against imposing a waiver-by-removal rule on the sovereign States.

The United States erroneously suggests that, although its own sovereign immunity cannot be waived through litigation conduct, the States enjoy no comparable right. U.S. Br., at 18-19 & n.6. The Court should reject this argument, as it is inconsistent with the established scope of the States' constitutional immunity and the Court's Eleventh Amendment jurisprudence.

Arguing that the Constitution grants exclusive control over the United States's money and property to Congress, whereas the Eleventh Amendment makes no comparable assignment to the legislatures of the States, the United States mistakenly concludes that an executive state official, like an attorney general, can waive the States' immunity in the absence of legislative consent. *See id.* This reasoning is unpersuasive on several levels.

First, it is well-established that the States' constitutional immunity is not limited to the text of the Eleventh Amendment, but encompasses more expansive attributes of sovereignty inherent in

the original constitutional design. *Alden*, 527 U.S., at 728-29. Second, the Court has acknowledged the "general rule" that a state legislature's specific enactment is required to waive immunity, *id.*, at 757-58, recognizing the need for waivers to be effected only after "deliberation by the political process established by the citizens of the State." *Id.*, at 751; *see also infra* Part I.C.

Finally, the Court has previously declined to afford the States fewer sovereign rights, with respect to immunity from individual suits, than those afforded the United States. Indeed, on several occasions the Court has analogized the States' sovereign immunity to that of the federal government and found no basis to distinguish the two. *See, e.g., Alden*, 527 U.S., at 749-50 ("It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts. In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege."); *College Sav.*, 527 U.S., at 682 ("[I]n the context of *federal* sovereign immunity—obviously the closest analogy to the present case—it is well established that waivers are not implied. We see no reason why the rule should be different with respect to state sovereign immunity.") (citation omitted).

Just as "[i]t has long been settled that officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision by Congress," *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947), the Court should similarly hold that state officers, like attorneys general, cannot unilaterally consent to suit on behalf of the States.

The act of removal should be no exception to this rule. The Court has already determined that the United States does not waive its immunity by removing a case: "The fact that [a] removal was effected on petition of the United States and the stipulation of its attorney . . . are facts without legal significance. Where jurisdiction

has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States." *Minnesota v. United States*, 305 U.S. 382, 388-89 (1939). Similarly, where consent to federal jurisdiction has not been conferred by a State's legislature, no officer of the State has power to give a federal court jurisdiction over the State. *Cf. id.*

C. State Legislatures Are Uniquely Equipped to Decide Whether and Where to Consent to Suit.

Apart from the limited circumstances under which Congress may abrogate the States' sovereign immunity pursuant to §5 of the Fourteenth Amendment, *see Garrett*, 531 U.S., at 365, 368, the decision to consent to suit traditionally rests with the legislatures of the States. *See, e.g., Alden*, 527 U.S., at 757-58 (noting Maine's adherence to "the general rule" that a State sheds its sovereign immunity only through an enactment of the state legislature); Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV., at 489 (observing that on the state level, like the federal level, "exclusive competence" to consent to suit "is vested in the legislative branch").

This general rule appropriately reflects the role of state legislatures in the political process, in which they are charged with balancing competing policy interests and promoting the public good. As the Court observed in *Hans*, "[t]he legislative department of a state represents its polity and its will, and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations." 134 U.S., at 21. Not surprisingly, therefore, States often confirm their legislature's exclusive authority to waive sovereign immunity in statutes, *see, e.g.*, 1 PA. CONS. STAT. §2310, constitutional provisions, *see, e.g.*, TENN. CONST. art. I, §17, and judicial precedent, *see, e.g., Baker v. Ives*, 294 A.2d 290, 298 (Conn. 1972).

State legislatures are best equipped to determine the circumstances under which a State should consent to suit, since suits may drain the State of scarce monetary resources and threaten "other important needs and worthwhile ends [that] compete for access to the public fisc." *Alden*, 527, U.S., at 751. "[A]llocation of scarce resources among competing needs and interests lies at the heart of the political process." *Id.* Thus, "[i]f the principle of representative government is to be reserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State." *Id.*

Permitting a state legislature to evaluate its citizens needs and allocate scarce resources protects the States' sovereign interests by centralizing their efforts to direct "the course of their public policy and the administration of their public affairs." *Id.*, at 750. Moreover, when this power is vested in the politically responsive legislative branch, citizens have the opportunity to voice their concerns and policy preferences through their elected representatives, whose actions are measured by "the political accountability so essential to our liberty and republican form of government." *Id.*, at 751. This ensures "the States' ability to govern in accordance with the will of their citizens." *Id.*, at 750-51; *see also* J. Brian King, Note, *The State Political Processes Theory of the 11th Amendment*, 19 REV. LITIG. 335, 356 (2000) ("When a state has not waived its immunity, it is because its citizens have willed it that way.").

Because waivers of immunity can cause citizens to suffer increased taxes or fees to pay for the costs of litigation and potential judgments against the State, those citizens should be afforded an opportunity to vote for representatives who will waive immunity only when, on balance, it advances the public good—*i.e.*, "when the benefits of such a waiver would outweigh the costs." King, *The*

State Political Processes Theory of the 11th Amendment, 19 REV. LITIG., at 360.

Accordingly, a State should not be deemed to consent to suit unless its legislature has determined that such consent promotes the State's interests and reflects its citizens' will. Implying consent to suit from other sources—such as an assistant attorney general's litigation conduct—would impermissibly "deprive the legislature of the power of judging what the honor and safety of the state may require," which is an offense to sovereignty "attended with greater evils than such failure can cause." *Hans*, 134 U.S., at 21.

Of course, a state legislature could choose to grant its attorney general, and his or her assistants, the power to waive sovereign immunity and consent to suit on behalf of the State. But that is a choice to be made by each state legislature, not a federal court. *Ford Motor Co.*, 323 U.S., at 467; *see infra* Part I.D.

Indeed, several States' legislatures have directly contemplated, and addressed by statute, the sovereign-immunity implications of an attorney general's litigation conduct. Typically, these statutes disclaim the attorney general's authority to waive the State's immunity from suit through certain acts. For example, the Texas legislature has decreed that "[a]n admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state." TEX. GOV'T CODE §402.004. And while the Wyoming legislature permits the "attorney general, his deputies or his assistants" to represent the State "in any courts of the state or the United States," WYO. STAT. §9-1-608(a),"[a]n appearance by the attorney general or his staff does not waive the sovereign immunity of the state." *Id.*; *see also* OKLA. STAT. tit. 74, §18g ("The appearance of the Attorney General in any matter, proceeding or action in any court, before any commission, board or officer, shall not be construed to waive the immunity of the State of Oklahoma from being sued.").

By contrast, the Alaska legislature, prior to January 1, 1999, expressly permitted its attorney general to waive the State's Eleventh Amendment immunity in select circumstances, such as suits involving Alaska's title to submerged lands. ALASKA STAT. §44.23.020(c). After January 1, 1999, however, that permission expired—except with respect to the attorney general's waivers in ongoing cases. *Id.*

Florida's legislature also waived sovereign immunity regarding certain litigation actions: When Florida sues to recover damages in tort, the State waives its immunity from tort counterclaims resulting from the same transaction or occurrence. FLA. STAT. §768.14.

Respecting the state legislatures' ability to make these choices is critical to preserve the States' sovereign status. A State's authority to "order the processes of its own governance" inheres in the nature of sovereignty and should not casually be displaced. *Alden*, 527 U.S., at 751-52. If the Court were to imply waiver from the defensive litigation conduct of a State's attorney general in circumstances in which the State's legislature has not authorized a waiver, it would cause a violation of *state* separation-of-powers principles by vesting a state executive officer with powers exclusively assigned to the legislative branch. *See Gwinn Area Cmty. Sch. v. Michigan*, 741 F.2d 840, 847 (CA6 1984) (holding that in the absence of express statutory consent to suit in federal court "the actions of attorneys representing the state defendants in this case in joining the removal petition cannot be treated as supplying a consent which the legislature withheld"); *cf. Alden*, 527 U.S., at 751 (counseling against federal assertions of authority that blur the "branches of the state governments, displacing state decisions that go to the heart of representative government") (internal quotation marks and citation omitted). Such an unwarranted intrusion into the political process of the States would offend federalism and sovereign-immunity principles. *Cf. Alden*, 527 U.S., at 751-52.

D. The Court Should Reaffirm *Ford Motor Co.*

In *Ford Motor Co. v. Department of Treasury*, the Court analyzed whether Indiana's attorney general could waive the State's Eleventh Amendment immunity by failing to assert it until the case reached the Supreme Court. 323 U.S., at 466-67. Consistent with the notion that only state legislatures can waive sovereign immunity, *see supra* Part I.C., the Court determined that Indiana's executive officers' ability to consent to suit turned on "their power under state law to do so." *Id.*, at 467. The Court noted that Indiana's legislature may waive immunity only by general law, and statutes authorizing the attorney general to defend suits against the State did not empower him to waive immunity. *Id.*, at 468-69. Consequently, consent to suit in federal court could not be inferred from the attorney general's defensive litigation conduct. *Id.*

Despite *Ford*'s reflection of well-established and enduring sovereign-immunity principles—including a State's right to define the scope of its consent to suit as a matter of state law—Petitioner Lapides and his *amici*, including the United States, urge the Court to overrule or limit *Ford* and permit implied waivers of sovereign immunity from an assistant attorney general's defensive litigation conduct, including removal of a case to federal court. *See* Pet'r Br. at 35-36, 39-40; U.S. Br., at 25-26; Ceres Marine Terminal Br., at 9-15. The Court should decline the invitation to depart from precedent and launch this dramatic assault on States' rights.

As previously discussed, *supra* Part I.C, the power to waive immunity properly resides in the legislatures of the States—bodies uniquely equipped to balance competing claims to the public fisc and define the circumstances under which a waiver of sovereign immunity would both reflect the citizens' will and create a net gain for the public good. Indeed, under our republican form of government, it is the state legislatures' duty to make law in furtherance of the public good.

State attorneys general, by contrast, do not make law. They discharge their duties as defined by state law—typically through powers conferred by state legislatures. *See generally* Resp't Merits Br., App. 18a-85a (collecting statutory and constitutional provisions detailing duties of the States' attorneys general, who primarily defend the States in individual suits, advise other executive officials on state law, and prosecute actions on behalf of the States as authorized by state legislatures).

The roles of state attorneys general and state legislatures, therefore, are simply not the same. And the decision of one assistant attorney general to remove a case hardly reflects the type of "deliberation by the political process of the citizens of the State" required to subject a State to suit. *Alden*, 527 U.S., at 751.

It is immaterial that in most States the attorney general is an elected official. *See* STATE ATTORNEYS GENERAL: POWERS & RESPONSIBILITIES 15 (Lynne M. Ross, ed. 1990). While that renders an attorney general politically accountable in a general sense, a state attorney general does not participate in any deliberative "political process" through which policy interests are balanced and waivers of sovereign immunity carefully struck. *See Alden*, 527 U.S., at 751-52.

Indeed, as a practical matter, the Attorney General in any particular state does not, and could not, participate in every litigation decision made by the numerous assistants who defend thousands of cases each year on behalf of a State. For example, in a large State like Texas, the Attorney General employs more than 600 assistants to represent Texas in roughly 50,000 active litigation cases per year—not to mention nearly 10,000 additional non-litigation matters and approximately 187,000 child-support filings.[3]

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3. These numbers were derived from Texas's *Office of the Attorney General Agency-Wide Strategic Plan Measure Report: Legal Division*

And even in one of the smaller attorney general offices, such as Respondent Georgia's, 115 assistants handle in excess of 10,000 litigation cases and nearly 6,000 non-litigation matters. Plus, more than 3,000 additional matters (overwhelmingly litigation cases) are handled by outside "special assistants" who are not employees of Georgia's Attorney General's Office.[4]

It is not feasible for a State's attorney general to personally review and approve every litigation decision—including removal decisions—made by assistants defending the State in particular cases. Nor, certainly, could every removal decision be referred to the State's legislature for a determination whether immunity should be waived in a particular case. Moreover, some legislatures may not even possess authority to waive the State's immunity on a case-by-case basis—which would be the consequence of the waiver-by-removal rule advocated by Lapides and his *amici*. *See Ford*, 323 U.S., at 468 (noting that Indiana's legislature can waive immunity only by "general law"—*i.e.*, "general consent to suit in all similar causes of action"). Presumably, States could enact legislation empowering assistant attorneys general to waive immunity through each act of removal. But, again, that would be the prerogative of each State. *See id.*, at 467; *supra* Part I.C.

The United States erroneously suggests that the state-law nature of attorney-general authority renders it an inappropriate subject for determination by a federal court. U.S. Br., at 19 n.6. Federal courts, however, have long been applying *Ford*'s principles without apparent difficulty—even in the removal context. *See, e.g., Estate of Porter*, 36 F.3d 684, 690-91 (CA7 1994); *Silver v. Baggiano*, 804

Case Summary (9/1/00–8/31/01), *Office of the Attorney General Agency Employee System* (Aug. 31, 2001), and the Child Support Division's *Legal Action Report* (MR 2050RU): Year to Date Totals (Aug. 31, 2001).

4. These numbers were derived from the Georgia Attorney General's *Internal Workload Report* (8/1/00–7/31/01).

F.2d 1211, 1214-15 (CA11 1986); *Gwinn Area Cmty. Sch. v. Michigan*, 741 F.2d 840, 846-47 (CA6 1984); *Newfield House, Inc. v. Mass. Dep't of Pub. Welfare*, 651 F.2d 32, 36 n.3 (CA1 1981). *But see Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1233-36 (CA10 1999). A far greater disservice to the States would occur if the Court adopted a generic waiver-by-removal rule that ignored state law and the issue of a particular state attorney general's authority to consent to suit.

The importance of preserving a State's Eleventh Amendment immunity, notwithstanding removal of a case by an attorney general, is reflected by the rule that immunity can be invoked for the first time on appeal—indeed even, as in *Ford*, for the first time in this Court. 323 U.S., at 467. This rule correctly acknowledges that invocation of the Eleventh Amendment imposes restraints on federal judicial power. *Id.*

Moreover, permitting state defendants to raise the Eleventh Amendment for the first time on appeal ensures that States will not involuntarily be subjected to suit based on the defensive litigation action of an assistant attorney general who lacks authority to waive a State's immunity. By contrast, a blanket waiver-by-removal rule would compel unconsenting States to defend suits prosecuted against them in federal court—the very evil the Eleventh Amendment was enacted to proscribe. U.S. CONST. amend XI. And such a rule would be incongruous with a State's right to preserve its sovereign interests through assertion of Eleventh Amendment immunity for the first time on appeal. *See Estate of Ritter v. Univ. of Mich.*, 851 F.2d 846, 852 (CA6 1988) ("It would be anomalous, to put it mildly, to hold that, while the question of eleventh amendment immunity may be raised for the first time (and even *sua sponte*) in this court of appeals, the immunity has been waived by the [State's] having removed the case to federal district court and by its failure initially to assert the immunity question on this appeal.").

The principles established by *Ford Motor Co.* appropriately accommodate state law and its relationship to a state attorney general's litigation conduct. To ensure respect for the States' sovereign interests, the Court should reaffirm *Ford Motor Co.* and confirm its application in the removal context.

II. IT WOULD OFFEND THE STATES' DIGNITY TO PARSE SOVEREIGN IMMUNITY INTO DEFEASIBLE COMPONENTS AND CASUALLY DISCARD THE PORTION OF SOVEREIGN IMMUNITY EXEMPLIFIED BY THE ELEVENTH AMENDMENT.

Neither Lapides nor the United States disputes that it would be repugnant to state sovereignty and core federalism principles to strip States of their overarching, constitutional immunity from suit upon their removal of a case to federal court. *See* Pet'r Br., at 9, 31; U.S. Br., at 22. Both Lapides and the United States do, however, deem forfeiture of *Eleventh Amendment* immunity a fair price for removal. They attempt to diminish the significance of the Eleventh Amendment by dubbing it a mere source of "forum immunity." By doing so, they suggest that compelling a State to forfeit "forum immunity" under a waiver-by-removal rule is less offensive to the States' dignity than inferring a complete waiver of the States' constitutional immunity from suit. This misses the point. Because the States are entitled to the full benefits of their sovereign status, it offends the States' dignity to peel away the layer of immunity exemplified by the Eleventh Amendment, even if other deeper layers of immunity remain intact.

The States' "inviolable sovereignty" is not subject to piecemeal erosion, and the Court should decline the invitation to gradually chip away at the States' sovereign status. *Cf. Alden*, 527 U.S., at 745 ("We have often described the States' immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court."). Depriving States of "forum immunity" is a direct assault on a central attribute of sovereignty that not only inheres in this nation's constitutional design, *see id.*, at 728-29, but

also is expressly embodied in the Constitution's text. U.S. CONST. amend. XI.

The fundamental significance of Eleventh Amendment immunity is confirmed by the "the shock and surprise throughout the country" that ensued when this Court, in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), held that the Judiciary Act of 1789 subjected States to suit in federal court by citizens of other States or of a foreign country. *Hans*, 134 U.S., at 11. This type of federal power over the States "had been expressly disclaimed, and even resented, by the great defenders of the constitution while it was on its trial before the American people." *Id.*, at 12. Consequently, in the first meeting of Congress following *Chisolm*, that body proposed the Eleventh Amendment with virtual unanimity; and the amendment was then adopted in due course by the legislatures of the States. *Id.*, at 11. In this remarkable chain of events, "[t]his amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and courts, actually reversed the decision of the supreme court." *Id.*

The history of the Eleventh Amendment reveals that so-called "forum immunity" was no small matter to the Framers and the people of the States whose legislatures ratified the Eleventh Amendment. Immunity from suit in federal court was a fundamental component of the constitutional design, and it should not lightly be cast aside. *See Atascadero*, 473 U.S., at 242 (noting that the "constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties" and the Court's "reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system") (internal quotation marks and citation omitted).

The consequence of a waiver-by-removal rule cannot be casually dismissed as a minor inconvenience to defendant States.

From a federalism perspective, usurpation of this aspect of state sovereignty is no less offensive than other impermissible invasions of state sovereignty this Court has deemed to violate the Framers' vision for our nation. This vision, as encapsulated in the Constitution, "specifically recognizes the States as sovereign entities." *Alden*, 527 U.S., at 713 (quoting *Seminole Tribe*, 517 U.S., at 71 n.15). And the immunity from suit afforded by the Eleventh Amendment, like other sovereign immunities inherent in the constitutional design, was designed to protect "the dignity and respect afforded a State." *Coeur d'Alene*, 521 U.S., at 268. To be faithful to the Framers' intent, therefore, the States' sovereign dignity must be respected—and it must be respected completely. Accordingly, the Court should reject the "forum immunity" waiver arguments advanced by Lapides and the United States and confirm that States retain all aspects of their sovereign immunity absent their express and unequivocal consent to suit.

III. A WAIVER-BY-REMOVAL RULE WOULD DESTROY STATES' ABILITY TO SATISFY COMPETING RESPONSIBILITIES AS SOVEREIGNS, EMPLOYERS, AND PROTECTORS OF THE PUBLIC GOOD.

A State may wear several different hats in the course of defending a lawsuit. At the most basic level, the State is a defendant. But, unlike most defendants, the State is also a sovereign. That means the State must protect both the public good and the public fisc. And that is not all. When a State is sued along with its employees, the State must consider the rights of those individuals who have been sued over actions taken in the course of public service. These individual co-defendants may wish to defend federal claims in federal court. But what if the suit includes state-law claims the legislature solely permits in state court?

With the benefit of removal, a State can ensure its employees a federal-court forum to adjudicate federal defenses like qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The

State can also, by invoking the Eleventh Amendment, respect its legislature's determination that the state-law claims not be heard in federal court. *See, e.g., Pennhurst*, 465 U.S., at 99-100 & n.9; *see also Coeur d'Alene*, 521 U.S., at 274 ("[I]t is acknowledged that the States have real and vital interests in preferring their own forums in suits brought against them."). Those claims, instead, could proceed in state court after a dismissal without prejudice or a remand by the federal court.

If, however, the Court were to adopt a rule requiring States to waive Eleventh Amendment immunity upon removal, this would all change. A State that acquiesces in employee-codefendants' preference for removal would sacrifice its legislature's express reservation of a state-court forum for state-law claims.

Then again, a State could abide by its legislature's directive by withholding consent to removal, causing the suit to remain in state court. *Chicago, Rock Island, & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900). But this would disadvantage its codefendant employees, sacrificing their desire for not only federal-forum expertise, but also, quite possibly, the opportunity to interlocutorily appeal a denial of qualified immunity: Although *federal* adverse qualified-immunity rulings are interlocutorily appealable under the collateral-order doctrine, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985), no comparable requirement exists in state courts. *Johnson v. Fankell*, 520 U.S. 911, 913 (1997). Instead, States are free to determine whether such an appeal should lie. And while some States recognize a right to interlocutorily appeal orders denying qualified immunity—either by statute, *see, e.g.*, TEX. CIV. PRAC. & REM. CODE §51.014(a)(5), judicial rule, *see, e.g.*, FLA. R. APP. P. 9.130(a)(3)(C)(vii), or caselaw, *see, e.g., Arneson v. Jezwinski*, 556 N.W.2d 721, 727 (Wis. 1996)—other States decline to guarantee immediate review. *See, e.g.*, GA. CODE §5-6-34(b) (vesting trial courts with discretion to certify orders for interlocutory appeal).

Thwarting employees' entitlement to interlocutorily appeal denials of qualified immunity is no small sacrifice. Qualified immunity was designed to strike a balance between vindicating civil rights and promoting public service by shielding government officials and employees from insubstantial civil rights claims. *See Harlow*, 457 U.S., at 818. As an immunity from suit, as well as liability, the benefits are "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S., at 526. An interlocutory appeal is essential, therefore, to ensure that public servants will not be subjected to the burdens of undue discovery and trial prior to thorough review of their qualified-immunity defense. In that sense, the defense enables public servants to perform their duties and serve the citizens of their State without unwarranted litigation distractions. Indeed, avoiding "excessive disruption of government" was one of the policy rationales for creating the defense. *See Harlow*, 457 U.S., at 818.

If employees forfeit some of qualified immunity's procedural protections in a state forum, the increased threat of suit and liability could dissuade individuals from taking state jobs, in which case everyone loses. State employees should not sacrifice their right to federal adjudication of qualified immunity—and a guaranteed, federal interlocutory appeal—simply because they were sued along with the State. But that would be the consequence of a waiver-by-removal rule, since States would have no choice but to block removal to preserve state-court adjudication of state-law claims. Indeed, a waiver-by-removal rule might induce plaintiffs to sue the State in addition to employees—purely to impede removal. Such manipulative litigation conduct should not be encouraged.

From a fairness perspective, moreover, plaintiffs are not disadvantaged when a State removes a case to federal court and then asserts Eleventh Amendment immunity on barred claims. As Lapides and the United States acknowledge, States would retain all "non-forum" immunities from suit notwithstanding removal. *See*

Pet'r Br., at 9, 31; U.S. Br., at 22. Thus, if a plaintiff's state-law claim would fail in state court, it also would fail in federal court. There is no meaningful advantage, therefore, to compelling States to forfeit Eleventh Amendment immunity upon removal.

Nor would plaintiffs lose any federal-court advantage in suing a State under 42 U.S.C. §1983, since a State is not a "person" subject to suit—in any court—under that statute. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). If anything, a *state defendant* might remove a case to ensure fair adjudication of its *Will* defense, since state courts do not always faithfully apply *Will*'s holding. *See, e.g., Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 581-82 (Tex. 2001) (reversing a court of appeals' s judgment directing trial to proceed on §1983 claims barred by *Will*). State defendants should have the option of seeking dismissal of §1983 claims under *Will*, while also asserting, in the alternative, Eleventh Amendment immunity from suit in federal court, just as Respondent Georgia did in this case. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779-80 (2000) (holding that courts may address a State's suability under a federal statute prior to Eleventh Amendment immunity); *Schacht*, 524 U.S., at 390; *McClendon v. Ga. Dep't of Cmty. Health*, 261 F.3d 1252, 1258-59 (CA 11 2001).

At most a plaintiff who wishes to sue both state and individual defendants on federal and state-law claims might have to litigate in two forums. Although the United States protests that the States have no right to require this result, U.S. Br., at 21-22, State *Amici* beg to differ. "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S., at 99-100 & n.9. If the plaintiff, as master of his complaint, wishes to bring both state and federal claims against the State and its employees, that choice may come at the price of litigating in two courts. That is simply the practical, and constitutionally appropriate, consequence of suing a State.

In the past, the Court has not inquired into "the reason or expediency of the rule which exempts a sovereign state from prosecution in a court of justice at the suit of individuals" but has simply "declared its existence" and enforced the rule. *Hans*, 134 U.S., at 21. Here, too, the Court should not examine the expediency of a State's decision to remove a particular case and assert Eleventh Amendment immunity. The Court need only recognize that the Eleventh Amendment's prohibition against suit in federal court exists—and that it applies to removed cases just as it applies to any other federal suit "prosecuted against one of the United States."

CONCLUSION

The Court should affirm the Eleventh Circuit's judgment.

Respectfully submitted,

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